

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001**

DATE: September 17, 1997

CASE NO.: 95-INA-393

In the Matter of:

DAVID P. CALLEO,
Employer,

On behalf of

LOLITA CAISIP CAPILE,
Alien.

Before: Burke, Guill, Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

The following decision is based upon the record upon which the CO denied the application for certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On June 14, 1994, Employer, David P. Calleo, filed for labor certification on behalf of Alien, Lolita Caisip Capile, to fill the position of "Household Cook." (AF 30). The position required two years of experience, and entailed cooking specific meals dictated by the household's needs and light housekeeping between meals. (AF 30). The hours were from 9:00 a.m. to 5:00 p.m.

On February 17, 1995, the CO issued his Notice of Findings (NOF). (AF 23). Therein, he proposed to deny certification, because it did not appear feasible that the duties described constituted full-time employment in the context of the Employer's household. Employer was advised that he must document that the position was full-time, which documentation must include (1) the number of meals prepared daily and weekly; the length of time required to prepare meals, the number of people for whom meals were prepared; (2) the frequency of household entertaining for the past twelve months, including the number of guests entertained and the number of meals served, if Employer was claiming that the alien would be employed on a full-time basis because of frequent entertaining; (3) the duties the alien would be performing, if any, other than cooking; (4) information regarding children, if any in the household; and (5) who will perform general household duties, and who has performed these duties since February of 1991.

Citing 20 C.F.R. §656.21(b)(2), the CO found the requirement that the worker perform housekeeping as well as cooking was a combination of duties not normally combined in the occupation of "Cook." Employer was required to document that the combination of duties was a business necessity or amend the job duties.

In a rebuttal dated March 20, 1995, counsel for Employer submitted a "Statement of Business Necessity" from Employer. (AF 8). Therein, Employer stated that the position was full-time, and that it combined the duties of Cook with some housekeeping. Employer further asserted that "it is a business necessity to combine these two in my house." As an explanation, Employer stated that his position as a Dean Acheson Professor and Director of European Studies, and as a "teacher, international program director, scholar, policy expert and fund-raiser for educational foundations," he entertains frequently by serving dinner at his home, at the rate of six to eight times per month. Employer argued that he entertains sophisticated groups of persons, requiring a high quality of cooking. Employer admits he "does not need a full-time cook." It is for this reason, that the cook is expected to perform light-housekeeping. According to Employer, "this combination of duties is both normal and reasonable." Employer advised that Alien prepares approximately two meals daily and ten meals per week for two persons, when he is not entertaining. There are no children in the household.

A Final Determination (FD) was issued on April 4, 1995. (AF 3). Therein, the CO denied certification, pointing out that the Dictionary of Occupational Titles (DOT) defines the position of Cook, Domestic Service, as one which involves only the preparation and serving of food. A "House Worker, General," however, clearly matches the duties described by Employer, as it includes the duties to maintain a private home clean and orderly, cook and serve meals, and render personal services to family members. The CO rejected Employer's argument that the employee needed to cook sophisticated meals, as Employer had not described a need for a full-time cook, performing only cooking related duties, but rather had described a full-time "House Worker, General." In support of this argument, the CO pointed out that only two meals per day for two persons were prepared on a daily basis by the employee. Employer's entertainment schedule also did not support the argument that a full-time cook was needed.

The CO also found, based upon the fact that generally only two meals per day are cooked, that the entertainment schedule was infrequent, and that the employee performs duties defined under the DOT as "House Worker, General," that Employer's letter regarding business necessity was not accepted as adequately supporting that the combination of duties should be defined as a "Cook."

By letter dated April 24, 1995, counsel for Employer filed an appeal of the denial. (AF 1). Therein, counsel for Employer reiterated the arguments previously stated in its rebuttal. (AF 1).

DISCUSSION

Section 656.50 defines "employment" as permanent full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full-time. In this respect, Employer was requested to provide documentation that the job opportunity was full-time. Employer, however, has conceded that the position of "Cook" is not full-time, and this is why he has required the cook to perform light house-keeping.

A combination of duties is presumed to be an unduly restrictive requirement. The presumption may be overcome if the employer demonstrates that:

- (1) it has normally employed persons for that combination of duties; and/or
- (2) workers customarily perform that combination of duties in the area of intended employment; and/or
- (3) the combination job opportunity is based on a business necessity

20 C.F.R. §656.21(b)(2)(ii); *See H. Stern Jewelers, Inc.*, 88-INA-431 (May 23, 1990).

The Board announced the standard of business necessity for a combination of duties in *Robert L. Lippert Theatres*, 88-INA-433 (May 30, 1990) (*en banc*):

An employer must document that it is necessary to have one worker perform the combination of duties, in the context of the employer's business, including a showing of such a level of impracticability as to make the employment of two workers infeasible. Implicit in this holding is a showing by the employer that reasonable alternatives such as part-time workers, new equipment and company reorganization are infeasible. A showing that the duties are essential to perform each other also helps to show business necessity, although such a showing is not necessary.

An assertion of convenience or practicality is insufficient to establish the business necessity of a combination of duties. *Id.* An assertion that a combination of duties would produce financial

savings for the employer also does not establish business necessity. *Chinese Community Center, Inc.*, 90-INA-99 (June 4, 1991).

As noted above, in the instant case Employer concedes that he does not need a full-time cook, and explains that this is why the cook will perform light housekeeping. His argument for the combination of duties is that the combination is a normal and reasonable one. While it is indeed a normal and reasonable combination of duties for a person performing general housework, it is not normal or reasonable for a person employed in the position of "Cook." Employer has failed to establish that it is customary for a cook to perform housework. He has also failed to establish a business necessity for the combination of duties, providing no documentation that the job requirements bear a reasonable relationship to the occupation of "Cook" in the context of Employer's business. The arguments set forth by Employer do not support accepting the combination of duties listed by him as being those which should be placed under the definition of "Cook." Labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

Entered at the direction of the panel:

Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full

Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.